Rayner Segismond Balagut & Anor v Saaid bin Abdullah & Ors

HIGH COURT (SANDAKAN) — CIVIL SUIT NO S22–35 OF 2008
LEE HENG CHEONG JC
6 MAY 2011

Contract — Letter of undertaking — Breach — Land owner appointed plaintiff to seek buyers for land at fixed selling price — Undertaking to pay the difference if buyer offered more than fixed price — Plaintiffs introduced company willing to pay more than fixed price — Deliberate failure of land owner to conclude sale — Land owner used third party to negotiate with same proposed buyer to buy land at higher price — Whether land owner breached undertaking — Whether reasons for not concluding deal with plaintiffs mala fide — Failure of defendants to testify — Evidence Act 1950 s 114(g)

The first defendant ('Saaid') owned a 500 acres plot of land ('the land'). He executed a letter of undertaking ('LOU') authorising the second plaintiff to seek and introduce a prospective buyer for the land at a selling price of not less than RM2,500 per acre. If the prospective buyer bought the land for more than that figure, Saaid undertook to pay the excess above RM2,500 per acre to the plaintiffs as their service fee and commission. The second plaintiff introduced the sixth defendant ('Jiang Sun') to Saaid as a purchaser which was prepared to pay RM4,100 per acre for the land. A draft sale and purchase agreement was prepared but Saaid intentionally failed to sign it and kept avoiding the second plaintiff, which led to the proposed sale being aborted. The fourth defendant ('Kang') was a director and substantial shareholder of Jiang Sun. He was also the substantial shareholder and director in the fifth defendant ('Tapak Yakin'). The court found that Saaid, after having known the identity of the purchaser from the draft sale and purchase agreement, appointed the second defendant ('Hiew') to approach Kang to negotiate for another deal which was more lucrative to Saaid. The commission requested by Hiew for finding a purchaser was much lower than the commission he agreed to give the plaintiffs. As a result, Tapak Yakin became the final purchaser of the land. The plaintiffs sued Saaid for breach of the LOU and for damages. After commencement of the trial, the plaintiffs withdrew their action against the fourth, fifth and sixth defendants. None of the first three defendants attended court to testify. The only witness who testified on their behalf was Saaid's son, who held a power of attorney granted by his father.

Held, allowing the plaintiffs' claim with costs on solicitors and clients basis:

(1) A valid and binding contract existed between the plaintiffs and the first

defendant and the latter had breached the contract. The first defendant's reasons for not concluding and completing the sale of the land with the buyer introduced by the plaintiffs were mala fide and not credible (see para 12).

(2) The plaintiffs had been dutifully performing their obligations under the letter of undertaking and were at all material times, willing and ready to continue performing their part thereunder. It was grossly inequitable for the first, second and third defendants to deny the plaintiffs the commission due to them (see para 21).

(3) The failure to call as witnesses the first, second and third defendants, who were represented by the same lawyers, to rebut the various allegations against them, or to call the fourth defendant, attracted the proper invocation of s 114(g) of the Evidence Act 1950. There was no reason why they were not called as witnesses unless they had something to hide. The irresistible conclusion was that their evidence would be unfavourable to the first defendant (see para 17).

(4) The plaintiffs, with the assistance of the fourth, fifth and sixth defendants, had proven on a balance of probabilities that it was the first defendant who sent the second defendant, Hiew, to see Kang after having had the benefit of getting the necessary information from the draft sale and purchase agreement of the aborted sale of the land to Jiang Sun (see para 13).

(5) The formula applied to compute the damages awarded to the plaintiffs was that which put them in a position as though the contract had been fully performed (see para 28).

[Bahasa Malaysia summary

Defendan pertama ('Saaid') memiliki 500 ekar bidang tanah ('tanah tersebut'). Dia menyempurnakan surat aku janji ('SAJ') memberikan kuasa kepada plaintif kedua untuk mencari dan memperkenalkan pembeli prospektif untuk tanah tersebut pada harga jualan tidak kurang daripada RM2,500 seekar. Jika pembeli prospektif tersebut membeli tanah untuk lebih daripada harga tersebut, Saaid berjanji untuk membayar lebihan yang melebihi RM2,500 seekar kepada plaintif-plaintif sebagai fi khidmat dan komisen mereka. Plaintif kedua memperkenalkan defendan keenam ('Jiang Sun') kepada Saaid sebagai pembeli yang sedia membayar RM4,100 seekar untuk tanah tersebut. Draf perjanjian jual beli disediakan tetapi Saaid sengaja gagal untuk menandatanganinya dan asyik mengelak plaintif kedua, yang menyebabkan jualan yang dicadangkan tersebut dibatalkan. Defendan keempat ('Kang') adalah pengarah dan pemegang saham substansial Jiang Sun. Dia juga pemegang saham substansial dan pengarah defendan kelima ('Tapak Yakin'). Mahkamah mendapati bahawa Saaid, selepas mengetahui identiti pembeli daripada draf pejanjian jual beli, melantik defendan kedua ('Hiew') untuk

A mendekati Kang untuk berunding untuk urus janji lain yang mana adalah lebih menguntungkan kepada Saaid. Komisen yang diminta oleh Hiew untuk memperolehi pembeli adalah lebih rendah daripada komisen yang dia bersetuju untuk memberi kepada plaintif-plaintif. Hasilnya, Tapak Yakin menjadi pembeli akhir tanah tersebut. Plaintif-plaintif menyaman Saaid untuk B kemungkiran SAJ dan untuk ganti rugi. Selepas permulaan perbicaraan, plaintif-plaintif menarik balik tindakan mereka terhadap defendan-defendan keempat, kelima dan keenam. Tidak seorang pun daripada ketiga-tiga defendan-defendan yang pertama menghadiri mahkamah untuk memberi keterangan. Satu-satu saksi yang memberi keterangan bagi pihak mereka C adalah anak lelaki Saaid, yang memegang surat kuasa wakil yang diberikan oleh bapanya.

Diputuskan, membenarkan tuntutan plaintif-plaintif dengan kos pada asas peguam cara dan anak guam: D

(1) Kontrak yang sah dan mengikat wujud di antara plaintif-plaintif dan defendan pertama dan defendan pertama telah memungkiri kontrak tersebut. Alasan defendan pertama untuk tidak menamatkan dan menyelesaikan jualan tanah dengan pembeli yang diperkenalkan oleh E plaintif-plaintif adalah *mala fide* dan tidak boleh dipercayai (lihat perenggan 12).

(2) Plaintif-plaintif telah taat melaksanakan tanggungjawab mereka di bawah surat aku janji dan pada kesemua masa, sanggup dan bersedia untuk meneruskan bahagian mereka di bawahnya. Ia adalah tidak F berekuiti bagi defendan-defendan pertama, kedua dan ketiga menafikan plaintif-plaintif dengan komisen yang perlu dibayar kepada mereka (lihat perenggan 21).

(3) Kegagalan untuk memanggil sebagai saksi-saksi defendan-defendan pertama, kedua dan ketiga, yang direpresentasikan oleh peguam-peguam G yang sama, untuk mematahkan pelbagai dakwaan terhadap mereka atau untuk memanggil defendan keempat, mewajarkan pemakaian s 114(g) Akta Keterangan 1950. Tidak terdapat sebab mengapa mereka tidak dipanggil sebagai saksi-saksi kecuali mereka menyembunyikan sesuatu. H Kesimpulan menarik adalah bahawa keterangan mereka tidak akan memihak defendan pertama (lihat perenggan 17).

(4) Plaintif-plaintif, dengan bantuan defendan-defendan keempat, kelima dan keenam, telah membuktikan atas imbangan kebarangkalian bahawa ia adalah defendan pertama yang menghantar defendan kedua, Hiew, I untuk berjumpa dengan Kang selepas mendapat manfaat dengan mendapat maklumat yang perlu daripada draf perjanjian jual beli jualan tanah yang dibatalkan kepada Jiang Sun (lihat perenggan 13).

(5) Formula yang diaplikasikan untuk mengira ganti rugi diawardkan

kepada plaintif-plaintif adalah yang mana meletakkan mereka dalam kedudukan seperti kontrak telah disempurnakan sepenuhnya (lihat perenggan 28).]

Notes

For cases on breach of letter of undertaking, see 3(3) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 5140–5142.

Cases referred to

Chase Perdana Sdn Bhd (formerly known as Chew Piau Bhd) v CIMB Bank Bhd [2010] 1 MLJ 685, HC (refd)
Curvet Transport SA & Anor v Shapadu Trans-System Sdn Bhd [1999] 4 MLJ 150, HC (refd)
Hadley v Baxendale [1843–60] All ER Rep 461 (refd)
Hock Hua Bank Bhd v Chan Siew Yan [2005] 7 CLJ 62, HC (refd)
Khaw Cheng Bok & Ors v Khaw Cheng Poon & Ors [1998] 3 MLJ 457, HC (refd)
Sri Kajang Rock Products Sdn Bhd v Mayban Finance Bhd & Ors [1992] 3 CLJ (Rep) 611, HC (refd)

Legislation referred to

Contracts Act 1950 s 74
Evidence Act 1950 s 114(g)

Tsang Hieng Yee (VK Liew & Partners) for the plaintiffs.
Mohammad Nor Yusof (Johari & Zelika) for the first, second and third defendants.

Lee Heng Cheong JC:

INTRODUCTION

[1] After the commencement of the trial of this case, the plaintiffs withdrew their action against the fourth, fifth and sixth defendants. The plaintiffs then proceeded with their action against the remaining defendants, namely the first, second and third defendants.

[2] The witnesses for the plaintiffs are the first and second plaintiffs respectively whilst the only witness for the first, second and third defendants is Mr Mohd Amir Khan bin Saaid, the son of the first defendant and who holds a power of attorney dated 10 October 2007 granted by the first defendant.

STATEMENT OF AGREED FACTS

[3] The relevant parties herein agreed to the following facts and they are that the first defendant is the successful applicant for the land held under LA

77091589 more or less 500 acres situated at Sungai Pinangah, Kinabatangan, Sabah with RSP No 2007259012.

STATEMENT OF ISSUES TO BE TRIED

[4] The parties herein agreed to the following issues to be tried and they are as follows:

(a) whether there is a binding contract or agreement between the plaintiffs and the first defendant since the first defendant had refused to sign the draft sale and purchase agreement between the first defendant and Jiang Sun Plantations (Sabah) Sdn Bhd?;

(b) if so, whether the first defendant has breached the said binding contract or agreement?;

(c) if so, what are the rightful damages entitled by the plaintiffs? and

(d) whether the defendants have committed the tort of conspiracy to injure, to interfere with or to procure the breach of a contract and/or to induce the breach of a contract against the plaintiffs?.

CONSIDERATION THE AGREED ISSUES

Whether there is a binding contract or agreement between the plaintiffs and the first defendant since the first defendant had refused to sign the draft sale and purchase agreement between the first defendant and Jiang Sun Plantations (Sabah) Sdn Bhd?

[5] To determine whether there is a binding or agreement between the plaintiffs and the first defendant, since the first defendant had refused to sign the draft sale and purchase agreement between the first defendant and Jiang Sun Plantations (Sabah) Sdn Bhd, it would be necessary to examine the relevant paragraphs of the letter of undertaking dated 6 January 2008, to ascertain the intention of the parties herein. The relevant paragraphs of the said letter of undertaking was signed by the first defendant in favour of the plaintiffs are reproduced as follows:

> I, SAAID BIN ABDULLAH (NRIC No. 390708–08–5369 [New / H0039895 [Old])... hereby agree and undertake that:
>
> (1) authorizes you to seek and introduce a prospective purchaser or purchasers for the above said Land at the selling price of not less than Ringgit Malaysia Two Thousand And Five Hundred (RM2,500.00) only per acre. In the event that you introduce a person who purchases the above said Land more than RM2,500.00 (Ringgit Malaysia Two Thousand And Five Hundred) only per acre, the sum excess shall be belong to you as your servicing and commission fee.

(2) ...

(3) ...

(4) ...

(5) *Upon the signing of Sale and Purchase Agreement between the respective purchaser or purchasers and my goodself. I will also simultaneously execute the Agency Agreement made between you and me. I shall be liable to pay the sum excess under Clause (1) hereinabove to you from the selling price of the above said Land.* (Emphasis Added.)

[6] A letter of undertaking shall be given its natural and ordinary meaning and this is laid down in the case of *Chase Perdana Sdn Bhd (formerly known as Chew Piau Bhd) v CIMB Bank Bhd* [2010] 1 MLJ 685:

> An undertaking is defined in the *New Shorter Oxford English Dictionary* as, inter alia, 'a pledge, promise or guarantee'. To 'undertake' is defined in Collins English Dictionary as 'to contract to or commit oneself to (something) or (to do something)'.
>
> ...
>
> *In accordance with the law relating construction of* contracts, *the LOU is to be accorded its natural and ordinary meaning given the context and factual matrix of the* contract. In *Michael C Solle v United Malayan Banking Corporation* [1986] 1 MLJ 45*, Hashim Yeop Sani FCJ said at p 46 as follows:*
>
> *The principles of construction to be applied to the undertaking are similar to those applied to an ordinary* contract. *The intentions of the parties are to be gathered from the language used. They are presumed to have intended what they said.*
>
> *The breach of an undertaking attracts damages in the same manner as a breach of* contract (see *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777 *at p 786). It is therefore correct to state that an undertaking is similar to that of contractual relationship.*
>
> *And how is the intention of parties ascertained? As stated by Lord Bingham of Cornhill in Bank of Credit and Commerce International SA v Ali & Ors* [2002] 1 AC 251*:*
>
> *To ascertain the intention of the parties the court reads the terms of the* contract *as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified.*
>
> ... In short the meaning to be accorded to the LOU is to be contextual. This is indeed significant as pointed out by Lord Hoffman in *Jumbo King Ltd v Faithful Properties Ltd & Ors* [1999J 2 HKC 507:
>
> *The construction of a document is not a game with words. It is an attempt to discover what a reasonable person would have understood the parties to mean. And this involves having regard not merely to the individual words they have used, but to the agreement as*

> *a whole, the factual and legal background against which it was concluded and the practical objects which it was intended to achieve. Quite often this exercise will lead to the conclusion that although there is no reasonable doubt about what the parties meant, they have not expressed themselves very well. Their language may sometimes be careless and they may have said things which, if taken literally, mean something different from what they obviously intended. In ordinary life people often express themselves infelicitously without leaving any doubt about what they meant. Of course in serious utterances such as legal documents, in which people are supposed to have chosen their words with care, one does not readily accept that they have used the wrong words. If the ordinary meaning of the words makes sense in relation to the rest of the document and the factual background, then the court will give effect to that language, even though the consequences may appear hard for one side or the other. The court is not privy to the negotiation of the agreement — evidence of such negotiations is inadmissible — and has no way of knowing whether a clause which appears to have an onerous effect was a quid prop quo for some other concession. Or one of the parties may simply have made a bad bargain. The only escape from the language is an action for rectification, in which the previous negotiations can be examined. But the overriding objective in construction is to give effect to what a reasonable person rather than a pedantic lawyer would have understood the parties to mean. Therefore, if in spite of linguistic problems the meaning is clear, it is that meaning which must prevail.* (Emphasis added.)

[7] Dato' VC George J in the case of *Sri Kajang Rock Products Sdn Bhd v Mayban Finance Bhd & 2 Ors* [1992] 3 CLJ 611 (Rep) held as follows:

> To constitute a valid contract there must be separate and definite parties thereto; those parties must be in agreement.That is there must be a consensus ad idem; those parties must intend to create legal relations in the sense that the promises of each side are to be enforceable simply because they are contractual promises and the promises of each party must be supported by consideration.

[8] In the present case I find that all the necessary ingredients of a binding contract existed in that I find that there are:

(a) an agreement, which consists of offer and acceptance (see *Hock Hua Bank Bhd v Chan Siew Yan* [2005] 7 CLJ 62);

(b) intention to create legal relation; and

(c) consideration.

[9] In the said letter of undertaking, I find that it is clear the first defendant has unequivocally appointed the second plaintiff to seek and introduce purchasers for the first defendant and that in the event that the second plaintiff manages to introduce a person who purchases the first defendant's land at the price of more than RM2,500 per acre, the second plaintiff shall have the extra income as her commission.

[10] Paragraph (5) of the said letter of undertaking further stated that upon the signing of sale and purchase agreement between the respective purchaser or purchasers and the first defendant, the first defendant will also simultaneously execute the agency agreement made between him and the plaintiffs. The said letter of undertaking further provided that the first defendant shall then be liable to pay the sum excess under cl (1) of the said letter of undertaking to the plaintiffs, from the selling price of the said land. Having considered the facts of the present case, I find that the second plaintiff has fulfilled the relevant conditions of the said letter of undertaking by introducing a purchaser to the first defendant at the price of RM4,100 per acre for the said land, a draft sale and purchase agreement was prepared but the first defendant intentionally refused to respond to the said draft sale and purchase agreement at all and avoided the second plaintiff which led to the proposed sale of the said land to be aborted.

[11] I find that the first defendant sought to resile from the agreement he had entered into with the plaintiffs as under the bargain with the plaintiffs and if the proposed sale of the said land introduced by the second plaintiff went through, the first defendant would only received the total sum of RM1,250,000 from the aborted sale to Jiang Sun Plantation (Sabah) Sdn Bhd (the sixth defendant) whereas under the sale to Tapah Yakin Sdn Bhd (the fifth defendant) introduced by the second defendant, the first defendant obtained about RM1,650,000, an extra of RM400,000. It is pertinent to note that the final purchaser of the first defendant's land is the said Tapak Yakin Sdn Bhd which had the same substantial shareholder and director as the company introduced by the plaintiffs to the first defendant, namely the fourth defendant herein and that the terms and conditions of the sale and purchase agreement between the first defendant and Tapak Yakin Sdn Bhd is not that drastically different from the proposed sale to Jiang Sun Plantation (Sabah) Sdn Bhd introduced by the plaintiffs which was aborted.

[12] I find that it would be grossly inequitable for the first, second and third defendants to deny the plaintiffs, the commission due to the plaintiff and to reap the fruits of the plaintiffs' hard work, bearing in mind that the plaintiffs had secured a bona fide buyer for the first defendant's said land but the first defendant's reasons for not concluding and completing the sale of the said land, introduced by the plaintiff, are mala fide and not credible.

[13] I noted that the first, second and third defendants did not testify despite various allegations being made against them by the plaintiffs. I find despite such clear and serious contention being made, I find that the defendants did not even bother to call either the first, second and third defendants to be witnesses, to rebut the various contentions, I hold that such omission or failure to call the first defendant, the second defendant, Hiew Pau Lu and the third

defendant, Gungkin @ Tung kin, who are represented by the same lawyers or the fourth defendant, Kang Jit Sing, will attract the proper invocation of s 114(g) of the Evidence Act because the plaintiffs together with the assistance of the fourth, fifth and sixth defendants has proven on the balance of probabilities that it was the first defendant who sent the second defendant, Hiew Pau Lu to see the fourth defendant, Kang Jit Sing, after having the benefit of getting the necessary information from the draft sale and purchase agreement of the aborted sale of the said land.

[14] The principles for invoking s 114(g) are stated in the case of *Curvet Transport SA & Anor v Shapadu Trans-System Sdn Bhd* [1999] 4 MLJ 150:

> The defendant contends that the plaintiffs should have called Jamal to prove the truth or otherwise of his committed statements, namely, when Jamal said to PW1 during the dinner in April 1997 when he confirmed that the shipping part of the project would be the plaintiffs' by saying, 'Don't worry, if the other people will give you trouble, call me' and further when on 12 September 1997 after the final freight rate had been agreed upon between PW2 and Jamal and when PW2 informed Jamal that the plaintiffs had already despatched the MV 'Enlivener' to South Korea to be in time for the first shipment and Jamal responded 'Good, at least we can be sure that there will be no delay'. Jamal was the general manager of the defendant and chairman of the tender management committee. The plaintiffs' witnesses confirmed that Jamal spoke those words. If the defendant wished to deny them surely it was the duty of the defendant to have called Jamal more so when Jamal was their own material witness. It was on account of this that I had earlier invoked s 114(g) of the Evidence Act 1950 against the defendant. *As a matter of fact, before the conclusion of the trial, learned counsel for the defendant did at one point indicate that Jamal would be the second witness for the defendant. This showed that Jamal was certainly available to give evidence. There was no evidence or explanation led by the defendant as to why such a material witness as Jamal did not give evidence.* (Emphasis added.)

[15] Another relevant case is the case of *Khaw Cheng Bok & Ors v Khaw Cheng Poon & Ors* [1998] 3 MLJ 457 which held:

> Cheng Bok, Cheng Liat and Cheng Hum leveled distinct charges against Cheng Poon from the witness-box and led evidence in support. They called witnesses who testified on numerous facts in dispute (paraphrased hereinbefore) which Cheng Poon had knowledge of the whole circumstances to give evidence to contradict or to deny. But Cheng Poon did not give evidence nor subject himself to cross-examination, although he heard, since he was in court throughout the trial (almost), all that was said or made out against him.
>
> In common law, *omnia praesumuntur contra spoliatorem*, all things are presumed against a wrongdoer. Therefore, in a civil proceeding, 'if a man by his own tortious act, withhold the evidence by which the nature of his case would be manifested, every presumption to his disadvantage will be adopted' (1 Smith LC (13th Ed) p 404). *Where a party has the means in his power of rebutting and explaining the evidence*

adduced against him, if it does not tend to the truth, the omission to do so furnishes a strong inference against him (A-G v Windsor 24 Beav 679 at p 706*).*

That maxim has been codified; s 114(g) of the Evidence Act 1950 *provides that the court may presume 'that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it'. An adverse inference may be drawn if reason for the absence of important material witnesses is not given (Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33*). However, a presumption under s 114 is not mandatory but discretionary (Synn Lee & Co Ltd v Bank of China* [1962] MLJ 395*). 'An adverse inference can only be drawn if there is withholding or suppression of material facts and not merely on account of failure to obtain evidence' (Munusamy v Public Prosecutor* [1987] 1 MLJ 492*, per Mohd Azmi SCJ).* But even then, '(a) presumption may be adopted if consistent with the proved facts' *(CEC v Comptrolier of Income Tax* [1971] 2 MLJ 43*,* per Winslow J*).* His Lordship explained (at p 58):

...

With regard to the presumption arising from a party not going into the witness box and the presumption arising from not calling witnesses acquainted with facts and keeping the adversary out of possession of evidence, Sarkar on Evidence (4th Ed) at pp 1547–1548 provides the following exposition on s 114(g) of the Indian Evidence Act, which is in pari materia with the Malaysian provision:

*Presumptions are necessarily made against parties who having acknowledge of the facts in dispute will not subject themselves to examination, when a prima facie case is made against them, and when by their own evidence, they might have answered it (Nawab Syed v Amanee 1*9 WR 149 PC at pp 150–151 … *Under such circumstances, it is Impossible to overlook the significance attaching to the refusal of the respondents and their son Jot Singh to enter the witness-box. It raises a presumption against them (Durga v Mathura* 15 CWN 717, 721–722; 10IC 963 PC*)*

...

Everything is to be presumed against a party who keeps his adversary out of the possession of evidence by taking means of retaining the evidence in his own custody. A similar presumption may also arise when a party does not call witnesses who are within his reach and are acquainted with the facts of the case (Thulai v SA 1973 AIR SC 501*; Virendra v Jagiwan* 1974 AIR SC 1957*; Sooriah v Cotaghery* 2 MIA 113, 125*; U Po v Edward* 1934 AIR Rang 139*; Trailakhya v Kenaram* 61 [CLJ] 551*). When a party failed to call as his witness the principal person involved and who was in a position to give first hand account of the matter in controversy and who could have refuted on oath the allegation on the other side, it is legitimate to draw an adverse inference.*

The court may draw adverse inference against a party who being in a better position to adduce better evidence deliberately abstain from doing so. Persons omitting to produce their best available evidence cannot take advantage of the abstract doctrine of onus of proof (Md Hussain v Secretary of State AIR 1939 Lah 330*).*

In the adversarial system of trials, a litigant has the absolute right to conduct his case as he sees fit. Nevertheless, for Cheng Poon, Richard and Howard, the failure of Cheng Poon to testify or offer himself for cross-examination, which was not a valuable contribution to their cause, would be a recurring theme when considering the evidence. (Emphasis added.)

[16] I hold that the first, second and third defendants' contention that Hiew Pau Lu was actually appointed by Kang Jit Sing is without basis because the fourth, fifth and sixth defendants at para 13 of their statement of defence filed herein, categorically denied that they knew the second and third defendants, namely Hiew Pau Lu and Gungkin @ Tungkin at any time. I further noted that the fourth, fifth and sixth defendant's counsel had also put the same question to the second plaintiff during the trial and the second plaintiff agreed to the said question. Hence, I find that both the plaintiffs as well as Kang Jit Sing have proved that it was the first defendant who had appointed Hiew Pau Lu to go and see Kang Jit Sing but not the other way round.

[17] The first, second and third defendants are fully aware of the case put forth by the plaintiffs as well as the fourth, fifth and sixth defendants' case against them. However, the first, second and third defendants omitted and/or failed to attend court as witnesses to rebut such cases put forth against them. It is very pertinent to note that both the first, second and third defendants are represented by the same solicitors. No reason or explanation whatsoever was given by the first, second and third defendant as to why they did not appear as witnesses despite the material allegations been made against them. Since the first, second and third defendants were also represented by a common lawyer, there is no reason why they were not called as witnesses, unless they have something to hide. Further the fact that the first defendant has made no attempt whatsoever to call the fourth defendant, Kang Jit Sing as a witness is also a good basis to trigger the invocation of adverse inference under s 114(g) of the Evidence Act 1950.

[18] I hold that the irresistible conclusion from the first, second and third defendant's failure and/or withholding of the first, second and third defendant's testimonies and the said Kang Jit Sing's evidence must be that their evidences would be unfavourable to the first defendant, if he had called them to testify in court. In the premises, I find that the contention made by the first defendant or his attorney that Hiew Pau Lu was appointed by Kang Jit Sing is not credible.

If so, whether the first defendant has breached the said binding contract or agreement?

[19] For the reasons stated in para 4 above, I find that the first defendant has breached the said contract or agreement.

[20] Furthermore, in the present case, I find that after the second plaintiff have introduced the fourth defendant, Kang Jit Sing to the first defendant pursuant to the said letter of undertaking dated 6 January 2008 and handed the draft sale and purchase agreement of the said land between the fourth

defendant's company namely Jiang Sun (Sabah) Sdn Bhd and the first defendant, to the first defendant, the first defendant together with his attorney and solicitor started to avoid the second plaintiff. The first defendant had given many reasons and excuses to keep the second plaintiff away for instance the first defendant contended that he could not agree to the terms of the draft sale and purchase agreement, despite the draft sale and purchase agreement was drafted by taking into account the first defendant's instructions. Despite being repeatedly requested for a counter proposal for amendment of the terms of the draft sale and purchase agreement, the first defendant failed to respond to the second plaintiff.

[21] I find that since the signing of the said letter of undertaking dated 6 January 2008, the plaintiffs have been dutifully performing their duties pursuant to the said letter of undertaking. They had, pursuant to the said letter of undertaking (i) introduced a bona fide purchaser to the first defendant, (ii) forwarded a draft sale and purchase agreement to the first defendant, (iii) when the first defendant claimed that he did not agree to the terms of the payment, the plaintiffs requested for an amended proposal from the first defendant but there was no response and (iv) the plaintiffs have testified in court that they are at all material times, willing and ready to continue performing their part pursuant to the said letter of undertaking, which is to pay for the necessary survey fee, premiums, registration fee, cesses, rents and other related levies.

[22] The first defendant further contended that the plaintiffs have breached the undertaking by not paying the 10% deposit allegedly promised by the plaintiffs. I find that this contention is not credible as there was no mention of such payment of deposit whatsoever in the said letter of undertaking dated 6 January 2008.

[23] I find and agree with the plaintiffs' contention that the first, second and third defendants' contentions are afterthoughts in order to justify as to why the first defendant refused to carry through the undertaking given by him to the plaintiffs and that the real intention of the first defendant is this: After having received the draft sale and purchase agreement, the first defendant discovered that the selling price was RM4,100 per acre and that the plaintiffs were making a lot of profit from the proposed sale. In the draft sale and purchase agreement, the first defendant knew the identity of the purchaser, hence, the first defendant appointed the second defendant, Hiew Pau Lu to approach Kang Jit Sing to negotiate for another deal which would be more lucrative to the first defendant. By doing so, the first defendant is afraid that the plaintiff may take action against him, hence, the first defendant requested the second defendant, Hiew Pau Lu to sign the indemnity, at p 6 of PBD.

[24] The first defendant contended that the reason for the indemnity was

actually to ensure that Hiew Pau Lu was not colluding with the plaintiffs. I find that such a contention is not credible and that it is an afterthought because of the conduct of the first defendant, in avoiding the second plaintiff, after receiving the draft sale and purchase agreement of the said land from the second plaintiff and also the commission requested by the second defendant, Hiew Pau Lu for introducing a purchaser for the said land, is much lower than the commission agreed to be given to the plaintiffs.

If so, what are the rightful damages entitled by the plaintiffs?

[25] Having found that there is a binding and valid contract between the plaintiffs and the first defendant and that the first defendant has breached the said letter of undertaking, I shall now proceed to address the issue of damages which consists of two sub-issues, namely the issue of the remoteness of damages and the issue of quantum of damages.

[26] The remoteness of damages is governed by the celebrated case of *Hadley v Baxendale* [1843–60] All ER Rep 461 and s 74 of the Contracts Act which is as follows:

> 74 Compensation for loss or damage caused by breach of contract
>
> (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
>
> (2) such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.
>
> (3) When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default as if the person had contracted to discharge it and had broken his contract.

[27] As regards the issue of quantum of damages. I find guidance in the textbook written by Krishnan Arjunan in *Contract Law in Malaysia* at p 509 which stated as follows:

> The concept of remoteness settles the heads of damage for which the defendant is legally liable to the plaintiff. But what amount or quantum or measure of damages should the plaintiff be awarded in respect of each of these heads? The issue of quantum is settled by the rule that the plaintiff should recover such an amount as will put him in the same position, so far as money can do so, as if the breach of contract had not taken place. The assessment of damages may take place on two different bases; 'expectation loss' and 'reliance loss'. A third basis for the award of damages seems to be emerging. This is 'restitutionary damages'.

[28] Since the settled rule for measure of damages is to put the plaintiff in the position as though the contract is properly performed, I shall apply this formula to compute the quantum of damages to be awarded to the plaintiffs.

[29] I agree with the plaintiffs' contention that if the said letter of undertaking given by the first defendant to the plaintiffs had been completely fulfilled, the plaintiffs would be entitled to the commission of RM350,000 which is computed as follows:

-	Total commission earned (RM4,100 - RM2,500) x 500 acres =	RM800,000
-	(Minus) Payment for survey fee, premium, registration fee, cesses, rents and other related levies (RM900 per acre as testified by the second plaintiff during the trial at Q&A 82 of the notes of proceeding) =	RM450,000
-	Nett commission entitled by the plaintiffs	*RM350,000*

Whether the defendants have committed the tort of conspiracy to injure, to interfere with or to procure the breach of a contract and/or to induce the breach of a contract against the plaintiffs?

[30] From the plaintiff's written submission dated 26 November 2010 and the first, second and third defendants' written submission dated 25 November 2010, there were no mention at all, of this agreed issue, as such I shall not deal with this agreed issue.

ORDER

[31] In the light of my findings on the above agreed issues, I therefore order as follows:

(a) judgment in the sum of RM350,000;

(b) interests at the rate of 8%pa on the said sum of RM350,000 from the date of this writ until judgment and at the rate of 8%pa from the date of judgment until full and final payment; and

(c) costs on a solicitors and clients basis.

Plaintiffs' claim allowed with costs on solicitors and clients basis.

Reported by Ashok Kumar